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In the Supreme Court of the United States

OCTOBER TERM, 1978

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a) is unreported. The district court's initial opinion and its opinion denying reconsideration (Pet. App. 2a-69a, 81a-90a) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1978. The petition for a writ of certiorari was filed on November 7, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals abused its discretion in denying an extraordinary writ to vacate an order of the district court requiring petitioners to turn over particular relevant documents.

STATEMENT

On November 20, 1974, the United States filed a civil action charging petitioners with monopolization, attempted monopolization, and conspiracy to monopolize telecommunications service and telephone equipment, in violation of Section 2 of the Sherman Act, 15 U.S.C. 2.[1] This case is one of the largest antitrust suits ever filed and litigated by the United States. Almost from the start, however, proceedings were stayed as petitioners pressed in the district court, the court of appeals and this Court the argument that the case should be dismissed on the ground of implied antitrust immunity.[2] Significant discovery did not begin in this suit until more than three years after its filing.

Although discovery is just starting in the government's case, discovery was far advanced, or even completed, in some of the private antitrust cases that had been filed against AT&T. The United States realized that it could greatly reduce the cost and greatly increase the pace of pretrial proceedings if it could streamline the traditional multi-million page document searches and the depositions that typify "big" cases by using the discovery already accomplished in private cases involving claims similar to those of the present case.

MCI and *Litton* are two such cases.[3] The government's contentions in the present case include allegations arising

[1] *United States* v. *American Telephone & Telegraph Co.*, Civ. No. 74-1698 (D.D.C.).

[2] *United States* v. *American Telephone & Telegraph Co.*, 427 F. Supp. 57 (D.D.C. 1976), cert. before judgment denied, 429 U.S. 1071 (1977), cert. denied, No. 77-1009 (D.C. Cir. May 26, 1977), cert. denied, 434 U.S. 966 (1977). Petitioners continue to press this issue, and the district court had again rejected their position that the antitrust laws do not apply to their activities. See Pet. App. 8a-28a.

[3] *MCI Communications Corp.* v. *American Telephone & Telegraph Co.*, Civ. No. 74 C 633 (N.D. Ill. 1974), petition for a writ of

out of petitioners' conduct toward MCI and Litton, and material relevant to the *MCI* and *Litton* cases is therefore also relevant to the government's case.[4] MCI's counsel have viewed more than seven million pages of documents produced in discovery, selecting, copying, microfilming, analyzing and indexing approximately 1.5 million relevant pages. Litton's counsel went through the same process, selecting one million pages from a total of five million.[5] AT&T has microfilmed the 2.5 million documents selected by counsel for MCI and Litton. AT&T also has examined and copied more than eight million pages of MCI documents; it has examined five million pages of Litton documents and copied at least two million.

The discovery in *MCI* and *Litton*—now almost finished—was governed by protective orders. The *MCI* order provided that any party could "file a motion with the Court that [any] material [initially treated as confidential] should not be deemed confidential" (Pet. App. 104a-105a para. 5). The *Litton* proctective order permitted application for "the disclosure of confidential materials to governmental officials or counsel for parties in similar actions" (Pet. App. 112a-113a para. 10).

In November 1977 the United States filed a motion in *MCI* requesting modification of the protective order to allow MCI to disclose to the United States copies of AT&T employee depositions and microfilm copies of AT&T documents selected by MCI counsel as relevant to

mandamus docketed, No. 78-2316 (7th Cir. Oct. 16, 1978), appeal docketed, No. 78-2317 (7th Cir. Oct. 16, 1978); *Litton Systems, Inc.* v. *American Telephone & Telegraph Co.*, No. 76 Civ. 2512 (S.D.N.Y. 1976). MCI has been a competitor of AT&T in long-distance communications. Litton is a supplier of telephone equipment.

[4] Both *MCI* and *Litton* have moved through pretrial proceedings much faster than this suit.

[5] Pet. App. 46a n.75. AT&T currently is defending some 40 antitrust suits that entail discovery relevant to this case.

its case.[6] The *MCI* district court, while indicating its agreement with the government's position, declined to modify the order until it could determine whether the United States District Court for the District of Columbia (in which the government's suit is pending) had any objection to such a change.

The United States in the meantime filed with the District of Columbia court a motion to require petitioners to produce their microfilm copies of the documents they had turned over to MCI and Litton and that were selected for use by the private plaintiffs. Petitioners stated a willingness to produce the documents, but only in paper form and only as an unidentifiable portion of the mass of millions of documents that AT&T had provided to MCI, Litton and other private parties (Pet. App. 46a n.74).

The District of Columbia court granted the United States' motion. It found that the documents sought are both relevant and non-privileged (Pet. App. 48a-55a).[7] It held that the prior selection of the documents in other litigation by MCI's and Litton's counsel did not excuse petitioners from producing them in this case, for petitioners had no valid claim of work product privilege concerning documents chosen by private counsel. *Id.* at 47a. The court determined that production "will ease the government's discovery burden and speed this litigation along" and that petitioners "have no legal interest in making the government's accumulation of proof more difficult or in delaying a trial on the merits." *Ibid.* In order to ensure that the case would not be further delayed, the court established a litigation plan under which the

[6]A similar motion is pending in *Litton*.

[7]The court established a mechanism to enable petitioners to preserve for judicial determination any claims of privilege they may have (Pet. App. 53a-55a).

parties would complete discovery by April 1, 1980. *Id.* at 57a-69a.[8]

The district court ordered petitioners to produce the documents by November 1, 1978, but "as a matter of comity and courtesy" sought the endorsement of the *MCI* and *Litton* district courts. *Id.* at 56a n.90.[9] On October 9, 1978, the Illinois court granted in full the United States' motion to amend the protective order. Pet. App. 91a-95a. The latter court agreed "wholly with Judge Greene's comments about the desirability of avoiding unnecessary duplication of discovery in these two cases" (*id.* at 92a) and rejected AT&T's contention that disclosure would unfairly prejudice it in the government's case. *Id.* at 92a-95a. The *MCI* protective order, the Illinois court ruled, "is in terms subject to change by further order of court" and could not reasonably be read to provide "a lifetime guaranty" of nondisclosure. *Id.* at 93a. Finally, after reviewing the facts, the court found not credible AT&T's new assertion that the government's former chief trial lawyer had in 1974 promised petitioners that the government would never seek MCI's discovery. *Id.* at 93a-95a.[10] *The Litton* court also indicated that it had no objection to the District of Columbia court's procedure.

[8]The court also rejected several other arguments of petitioners. It rejected their renewed contention of lack of jurisdiction (Pet. App. 8a-28a) and held that agencies and departments of the Executive Branch will be treated as the United States for purposes of discovery, but that independent regulatory agencies would be treated as third parties (*id.* at 28a-42a).

[9]Because the United States had not discussed whether "additional factors" were present respecting the depositions taken in the private litigation, the court denied without prejudice the government's motion with respect to those items. Pet. App. 56a n.91.

[10]AT&T had not mentioned this matter when it briefed and argued the government's motion before the Illinois district court in 1977.

On October 18, 1978, the District of Columbia court issued an opinion denying a petition for reconsideration.[11] Pet. App. 81a-90a. It rejected petitioners' contention that "because the *MCI* and *Litton* documents are under protective orders, they are beyond the reach of discovery here." *Id.* at 86a.[12] The court also adopted the *MCI* court's analysis of the United States' alleged promise never to seek MCI's discovery. *Id.* at 84a-86a.

On October 25, 1978, petitioners filed their petition for a writ of mandamus in the United States Court of Appeals for the District of Columbia Circuit. On October 31, 1978, that court summarily denied mandamus (Pet. App. 1a). On November 1, 1978, petitioners filed in this Court an application for a stay. The November 2, 1978, order of the Chief Justice continuing the short stay of the court of appeals was vacated, and the application for stay was denied, on November 13, 1978. That day petitioners delivered to the United States microfilm copies of the disputed documents.

ARGUMENT

The court of appeals' decision is correct, does not conflict with any decision of this Court or any court of

[11]Before the District of Columbia court could rule, AT&T challenged the order in *MCI* by appeal and petition for a writ of mandamus. Both are pending in the United States Court of Appeals for the Seventh Circuit. *MCI Communications Corp.* v. *American Telephone & Telegraph Co.*, Nos. 78-2316 and 78-2317 (7th Cir. Oct. 16, 1978).

[12]The court observed that petitioners "are arguing in the U.S. Court of Appeals for the Seventh Circuit * * * that the *MCI* court is without authority to lift a protective order once entered. If these contentions are correct, defendants would be immunized, as a practical matter, from ever having to provide adequate discovery in this action" (Pet. App. 86a). It held that "there is no basis for concluding that the court in which [documents] happen to have been produced first has the power, by virtue of that fact, to preclude their production when a litigant in another action legitimately requires them for the preparation of his case." *Id.* at 86a-87a (footnotes omitted).

appeals, and does not present any issue warranting plenary review.

1. The sole question presented by the petition is whether the court of appeals abused its discretion by refusing to issue a writ of mandamus that would set aside the district court's order that AT&T turn over 2.5 million relevant, non-privileged documents as a distinct group rather than indistinguishably intermingled with 9.5 million unwanted documents.

Mandamus is a remedy peculiarly within the discretion of an appellate court. Even if the court may grant mandamus in a particular case of contested discovery, we are aware of no principle requiring it to do so. To the best of our knowledge this Court has never reversed the denial of mandamus in a case dealing with documentary discovery. See *United States Alkali Export Association, Inc.* v. *United States*, 325 U.S. 196, 202 (1945) (mandamus unavailable even though the wait until final judgment caused hardship); *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 30 (1943) (same).[13]

This Court's reluctance to interfere with court of appeals' discretion in this area springs from the nature of mandamus itself. "[O]nly exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation" of mandamus. *Kerr* v. *United States District Court*, 426 U.S. 394, 402 (1976). That rule is especially appropriate when, as here, petitioners seek mandamus to upset an order concerning discovery in a pending case. See *Will* v. *Calvert Fire Insurance Co.*, No. 77-693 (June 23, 1978). There is a strong policy against

[13]Petitioners' reliance (Pet. 2) on *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964), is misplaced. That case, which was the first challenge to a court's power under Fed. R. Civ. P. 35, involved not discovery in the traditional sense but the very different and extremely personal matter of physical and mental examination of a party.

piecemeal review of cases, and the great number of discovery rulings that may be made in any case counsels against appellate intervention to review claims of simple mistake.[14] This is all the more so where, as here, the documents whose production is disputed have already been turned over to the government.

The district court's decision was not a usurpation of power; it was plainly right. The United States sought some 2.5 million relevant and specifically identified documents that petitioners microfilmed and maintained in a separate file. Thus they could be, and indeed have been, produced to the United States with a minimum of inconvenience to petitioners. Petitioners, who were willing to produce them without a claim of privilege, made it plain to the district court that they desired to flood the United States with some 9.5 million unwanted documents that would disguise the identity of the documents the United States sought. The district court's discovery order properly rejected petitioners' tactic and helped to ensure that this massive case, plagued by inordinate delay, will at last move forward in an orderly fashion. The order will assist the parties in meeting the court's discovery schedule, and the United States has not received a single document that it would not have received under petitioners' proposal.

Petitioners do not argue that the district court abused its discretion;[15] they maintain, instead, that it had no

[14]The court of appeals here properly applied the established rule that where there is an adequate alternative means of relief mandamus will not lie. See *Kerr, supra,* 426 U.S. at 403.

[15]Petitioners' brief suggestion that the district court abused its discretion in relying on the findings of the *MCI* district court that the government had not promised petitioners never to seek *MCI*'s discovery (Pet. 16) is insubstantial. It is highly doubtful that an abuse of discretion in discovery is reviewable at all by extraordinary writ, *Will* v. *Calvert Fire Insurance Co., supra,* slip op. 9 n.7, where there

discretion. But they cite no authority for the proposition that a court must permit a defendant to swamp the plaintiff with unwanted documents, when the wanted documents already have been segregated and identified. Petitioners simply seek to tie the hands of the court in a way that would be at odds with the need to assure "just, speedy, and inexpensive" determinations of actions. Fed. R. Civ. P. 1. Petitioners' position, as the district court found, would increase litigation costs for no good purpose, enlarge delay and work to the end of denying justice (Pet. App. 47a-48a).

Petitioners' assertion (Pet. 17-20) that the district court's ruling conflicts with other decisions on point is wrong. No decision holds that a district court loses its discretion under Fed. R. Civ. P. 34 to order one party to produce relevant, non-privileged documents to its adversary party simply because lawyers in some other litigation have identified the documents as relevant. Most of the cases cited by petitioners do not even deal with the situation presented here of Rule 34 discovery by one party of the other's documents.[16] Instead, they involve dis-

would be adequate remedy on an eventual appeal from the final judgment. In any event, the *MCI* court carefully discussed petitioners' contention and found the assertion incredible (Pet. App. 92a-95a). There was no need for the district court to recanvas an issue decided by a coordinate court.

[16]*GAF Corp* v. *Eastman Kodak Co.*, 415 F. Supp. 129 (S.D. N.Y. 1976); *United States* v. *GAF Corp.*, 1978-1 Trade Cas. para. 62,015 (S.D. N.Y. 1978); *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 1978-1 Trade Cas. para. 61,961 (E.D. Pa. 1976); *Martindell* v. *International Telephone & Telegraph Corp.*, 25 F.R. Serv. 2d 1283 (S.D. N.Y. 1978); *Data Digests, Inc.* v. *Standard & Poor's Corp.*, 57 F.R.D. 42 (S.D. N.Y. 1972); *Milsen Co.* v. *Southland Corp.*, 1972 Trade Cas. para. 73, 865 (N.D. Ill. 1972); *In re Coordinated Pretrial Proceedings in Western Liquid Asphalt Cases,* 18 F.R.Serv. 2d 1251 (N.D. Cal. 1974); *Alcoa* v. *United States Department of Justice,* 1978-1 Trade Cas. para. 61,824 (D. D.C. 1978); *Wyly Corp.* v. *American Telephone & Telegraph Co.*, Civ. No. 76-1544 (D. D.C. 1976); *William Inglis & Sons Baking Co.* v. *ITT*

cretionary district court decisions whether to impose or modify protective orders where non-parties sought the parties' documents. Moreoever, petitioners do not take into account cases where district courts exercised their discretion and refused to issue (or modified) a protective order so that other litigants could use the material in their own cases.[17] Two decisions cited by petitioners that do deal with Rule 34 discovery do not stand for the proposition that the court lacks discretion.[18] And, at all events, none of the cases cited by petitioners involves a decision by a court of appeals to issue mandamus to forbid disclosure; there is, therefore, no arguable conflict

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Continental Baking Co., No. C-71-1906-SW (N.D. Cal. Sept. 30, 1974); *TV Signal Co. of Aberdeen* v. *American Telephone & Telegraph Co.*, Civil Action No. 70-6N (D. S.D. July 14, 1978); *In re Cement and Concrete Antitrust Litigation*, Civ. No. 76-788A PHX CAM (D. Ariz. 1978).

[17]The only appellate decision on this question held that it was an abuse of discretion for the district court *not* to modify a protective order for the benefit of third party litigation. *Olympic Refining Co.* v. *Carter*, 332 F. 2d 260 (9th Cir. 1964); See also, *e.g.*, *Williams* v. *Johnson & Johnson*, 50 F.R.D. 31 (S.D. N.Y. 1970); *Johnson Foils, Inc.* v. *Huyck Corp.*, 61 F.R.D. 405 (N.D. N.Y. 1973) (both refusing to issue protective orders); *Essex Wire Corp.* v. *Eastern Electric Sales Co.*, 48 F.R.D. 308 (E.D. Pa. 1969) (denied in part); *American Security Co.* v. *Shatterproof Glass Corp.*, 20 F.R.D. 196 (D. Del. 1957); *United States* v. *International Business Machines Corp.*, 67 F.R.D. 40 (S.D. N.Y. 1975) (all four modifying protective orders.)

[18]See *United States* v. *ARA Services, Inc.*, 1978-2 Trade Cas. para. 62,250 (E.D. Mo. 1978); *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 1978-1 Trade Cas. para. 62,019 (E.D. Pa. 1978). Both of these cases simply express discretionary judgments different from the one here. Moreover, both these decisions relied entirely on *GAF Corp.* v. *Eastman Kodak Co.*, 415 F. Supp. 129 (S.D. N.Y. 1976), and, as the court here observed, *GAF* turned on its unusual facts. There the United States sought Kodak documents discovered by GAF before the government had made any decision whether or not to bring its own litigation. The court expressed concern that disclosure of the documents selected by an adversary might unfairly influence the government's discretion to initiate proceedings—especially criminal proceedings. In the present case, by contrast, the United States filed suit long ago and merely seeks documents under Rule 34 for this case.

among the circuits on the availability of mandamus for this end.

Petitioners' effort to strip the district court of discretion is in reality an attempt to create a new form of work product privilege, under which they can assert a privilege in MCI's or Litton's work product. The district court correctly held that neither Fed. R. Civ. P. 26(b), which sets forth the contours of work product privileges, nor anything else authorizes such a startling inversion of that doctrine. Pet. App. 47a.[19]

Finally, petitioners' contention that review should be granted because the district court's order puts them at a disadvantage in discovery (Pet. 30-36) is frivolous. The district court carefully examined this contention and found it to be without merit (Pet. App. 53a n.86).[20] Review of such a determination is not the office of mandamus. *Will* v. *Calvert Fire Insurance Co.*, *supra.*

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[19]Both Litton and MCI, whose work products are involved, have stated that they have no objection to the government's discovery.

[20]Petitioners in fact are well ahead of the United States in discovery. While discovery in this case was stayed for three years, AT&T was able to conduct extensive and useful discovery in private cases where the issues are the same as some of those in the government's case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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